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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1863~~ 70-318

JAMES A. HARRIS, JR., RALPH I. KNOWLES, ANNE SMITH, ROBERT SMITH, and WALTER GOMEL, suing individually and on behalf of others similarly situated,

Petitioners,

— *v.* —

W. D. SAMUELS, JR., individually and as Chairman of the Tuscaloosa County Board of Registrars; JERRI RICHARDSON and ESTELLE HANSFORD, individually and as members of the Tuscaloosa County Board of Registrars; and the TUSCALOOSA COUNTY BOARD OF REGISTRARS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

No opinion below has been reported. Appended are copies of the district court's temporary injunction, October 16, 1968, pages 1a- 2a; the district court's judgment, February 9, 1970, page 3a; the court of appeals' opinion, March 16, 1971, pages 4a- 13a; the court of appeals' judgment, March 16, 1971, page 14a; the court of appeals' order denying rehearing, April 7, 1971, page 15a; and the court of appeals' order staying its mandate for sixty days, April 23, 1971, page 16a.

Not appended are the findings of fact and conclusions of law of the district court of October 16, 1968 and February 9, 1970, which are not relevant to the issues here presented. In order that the Court may have access to these, petititioners have requested that the record below be certified to the Court.

JURISDICTION

The judgment below was rendered March 16, 1971, and entered on the same day. Rehearing was denied by an order dated April 7, 1971. 28 U.S.C. § 1254 (1) is believed to confer jurisdiction on this Court.

QUESTIONS PRESENTED

1. Whether petitioners, citizens of Alabama, alleging that they are discriminatorily disfranchised, must now, two and a half years after the filing of this class action, seek their state court remedies, although this Court has held abstention inappropriate where the fundamental civil rights of a broad class of citizens are jeopardized.

2. Whether the court below properly overrode the district court's discretionary determination not to abstain but to proceed to trial on the merits of a claim of mass disfranchisement, thereby relegating the plaintiffs to long delay and litigation in the state courts.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the first amendment and sections 1, 2 and 5 of the fourteenth amendment of the Constitution of the United States, to-wit:

Amendment I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of

the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

and Ala. Code tit. 17, § 17 (1958), to-wit:

§ 17. Residence not acquired or lost by temporary absence. No person shall lose or acquire a residence either by temporary absence from his or her

place of residence without the intention of remaining, or by being a student of an institution of learning, or by navigating any of the waters of this state, the United States, or the high seas, without having acquired any other lawful residence, or by being absent from his or her place of residence in the civil or military service of the state, or the United States; neither shall any soldier, sailor or marine, in the military or naval service of the United States, acquire a residence by being stationed in this state.

STATEMENT OF THE CASE

A. The Procedure Below.

Pursuant to Rule 23, Federal Rules of Civil Procedure, plaintiffs brought this class action under 42 U.S.C. § 1983, and 28 U.S.C. §§ 1331 and 1343, for protection of their right to vote, guaranteed by the first and fourteenth amendments of the Constitution of the United States, in the United States District Court for the Northern District of Alabama, on October 14, 1968. Two days later, after a preliminary hearing, the Hon. H. H. Grooms, to whom the case was assigned, issued a preliminary injunction protecting that right, and ordering the defendant-respondents to register any member of the plaintiff class who met the normal standards required of any registrant to vote.

Six months later, Judge Grooms having announced his retirement and the case having been reassigned to the Hon. Seybourn Lynne, trial was had on May 28 and 29, 1969. Eight months thereafter, on February 9, 1970, Judge Lynne rendered his decision, dismissing the claim of the plaintiffs on the merits, and dissolving the injunction issued by Judge Grooms. Upon motion, however, that mandate was stayed pending disposition of appeal, which was timely filed in the United States Court of Appeals for the Fifth Circuit. On March 16, 1971, that court held that the district court had erred in

holding trial on the matter, and that is should have abstained from deciding the issues until a state court proceeding had been held. On April 7, 1971, the court denied a petition for rehearing.

B. The Facts of the Case

On October 8, 1968, James Harris, who had lived in Tuscaloosa County, Alabama, for more than six years, who had married there, and had a child born there, was refused the right to register to vote in that County, on the grounds that he was a non-resident. The ground which the defendant Board of Registrars of the County gave for failure to register him was that, prior to his coming to the County seven years earlier, he had lived with his parents in Jefferson County, Alabama, and, in 1965, had registered to vote there. Mr. Harris testified, at a hearing on preliminary injunction, that he had been peremptorily rejected when he answered affirmatively the Board Member's first question — whether he was a student at the University of Alabama (HT22):[1]

> No, sir. She had just finished registering someone and we (Mr. Harris was accompanied by his wife) went up and took two vacant chairs, and she called us to come over, and we sat down and her first question was are you students, and we said yes, and she said you can't register.

Mr. Harris also testified that one of the several jobs he had applied for was as clerk to the Honorable Walter Gewin, of the United States Court of Appeals for the Fifth Circuit (HT 24, 26-28).

Mr. Harris' experience was not unique. Many other students had undergone similiar rejection by the Board, on the same grounds. Typical of these was Mr. Ralph Knowles, who had accompanied Mr. Harris, and had

[1] The transcript of the hearing on motion for preliminary injunction is referred to herein as "HT."

been likewise rejected, notwithstanding his offer to sign an affidavit as to his intention to reside and remain in the County (HT9).

After determining that this was a general policy of the Board, Mr. Harris and Mr. Knowles, joined by several other students who had also been rejected by the Board, filed suit in the United States District Court for the Northern District of Alabama. The complaint alleged that the Board was improperly interpreting and applying Ala. Code tit. 17, § 17 (1958), and treating students unequally from other classes of applicants for registration.

At the hearing before the Honorable H. H. Grooms on October 16, 1968, defendant W. D. Samuels, chairman of the Board of Registrars, testified that he would register, among others, a student, who had already secured a definite postgraduation job in the County (HT 36). In a deposition on May 10, 1969, he stated that an intent to remain in Tuscaloosa after graduation, without prospective employment, would not be sufficient for registration (Deposition 25). After the October 16, 1968, hearing, Judge Grooms issued a preliminary injuction in conformity with his findings:

> The Court finds that these plaintiffs and those similarly situated should be permitted to register if they will sign sworn statements that they presently intend to remain in Tuscaloosa County permanently or for an indefinite period after completing their studies . . . or after his or her spouse completes his or her studies . . . . (PI 2-3). [1]

Seven months later a day-and-a-half trial, supplemented by numerous depositions and much documentation

[1] The Findings of Fact and Conclusions of Law on Prayer for Preliminary Injunction are referred to herein as "PI."

and other information, was had before the Honorable Seybourn Lynne. On February 9, 1970, Judge Lynne issued a four-page opinion on the merits, incorporating a 33-page memorandum by his law clerk, denying relief to the plaintiffs, and dissolving the injunction which Judge Grooms had ordered in October, 1968.[2]

Appeal was taken to the United States Court of Appeals for the Fifth Circuit. Briefs, dealing only with the merits of the case, were timely filed, and oral argument was heard on December 10, 1970. At no time during oral argument was the issue of abstention raised by any party or from the bench; and the question had never been briefed by either side during the entire two year period of litigation. The only way in which the issue may colorably be said to have been raised is paragraph 17 of defendants' answer, to-wit:

> It has not been finally determined under the laws of Alabama whether plaintiffs are entitled to registration or not as electors in Tuscaloosa County, Alabama.

Nevertheless, on March 16, 1971, the court below issued its opinion, holding that the plaintiffs' challenge to the interpretation of Ala. Code tit. 17, § 17 (1958) required that they first seek remedy in the state court and that the district court trial was erroneously held, and remanding the case to that court with an order that it abstain from decision pending construction, or exhaustion of efforts to obtain construction, of the statute by the state courts.

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[2] On April 3, 1970, Judge Lynne stayed the judgment pending appeal. On April 23, 1971, after its judgment adverse to the appellants, the Fifth Circuit stayed its mandate sixty days pending application to this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

THE WRIT SHOULD ISSUE BECAUSE THE MERITS OF THIS CASE, INVOLVING THE POSSIBLE CONTINUATION OF THE DISFRANCHISEMENT OF MILLIONS OF VOTERS, SHOULD BE DECIDED PROMPTLY BY THE FEDERAL COURTS.

This fall, some eight million students will be attending colleges and universities in the United States. Many of them are being educated in towns other than the ones in which their parents live. In many states, as in Alabama, those citizens are being effectively disfranchised. The decision of the lower court, abstaining from deciding whether this disfranchisement is constitutional or not, may perpetuate that discrimination for years. Restrictions of the franchise "strike at the heart of representative government," *Reynolds v. Sims,* 377 U.S. 533, 555 (1964), and should be resolved quickly and efficiently. That has not happened here. Return of this case to the state courts of Alabama will prolong the restriction of the franchise.

I. Where Mass Disfranchisement of a Broad Class of American Citizens Is Alleged, Abstention Is Improper.

The decision of the court below is contrary to the well-established doctrine that abstention, to be used in any event only in very narrow, limited "special circumstances," *Zwickler v. Koota,* 389 U.S. 241, 253 (1967), *Baggett v. Bullitt,* 377 U.S. 360, 375 (1964), is totally inappropriate where there are basic human liberties at stake and relief is legitimately sought pursuant to the Civil Rights Act, *McNeese v. Board of Education,* 373 U.S. 668 (1963); *NAACP v. Bennett,* 360 U.S. 471 (1959); *Griffin v. County School Board of Prince Edward County,* 377 U.S. 218 (1964). As the Second Circuit recognized in

Wright v. McMann, 387 F.2d 519, 525 (2d Cir. 1967), "[c]ases involving vital questions of civil rights are the least likely candidates for abstention." See also *Moreno v. Henckel*, 431 F. 2d 1299 (5th Cir. 1970); *Hargrave v. Kirk*, 313 F. Supp. 944 (M.D. Fla. 1970).

Commentators have both recognized the rule and urged its further expansion. Thus, Professor Wechsler, prime author of the American Law Institute Study on the Division of Jurisdiction Between State and Federal Courts, said as early as 1948 that:

> [t]hese observations (on the value of the abstention doctrine) call for qualification in one instance: the rights of action specially conferred by Congress in the Civil Rights Laws. There Congress has declared the historic judgment that within this precious area . . . there is to be no slightest risk of nullification by state process . . . Needless to say, to formulate the scope of the exception is no drafting problem; its measure is the rights of action given by the Civil Rights Laws. Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law and Contemporary Problems 216, 230 (1948).

The most recent survey of the abstention cases has concluded that this Court has basically followed that view:

> [t]he Court has abandoned the abstention principle in the civil rights cases when construing state statutes and administrative determinations where the record is fully developed and the issues are concrete and ripe for review . . . More recent cases are premised upon the assumption that Supreme Court judgment on civil rights, which is entitled to preferential protection under the Constitution, is a final judgment on the merits. Schoenfeld, American Federalism and the Abstention Doctrine in the Supreme Court, 73 Dick. L. Rev. 605, 617 (1969).

The view that abstention is improper in civil rights litigation in general has gained specific impetus from this Court's continuing protection of those most "perishable" and "fragile" of all rights—freedom of speech and expression. *Zwickler v. Koota*, 389 U.S. 241 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964).

That the right to vote is a fundamental right and essentially a first amendment right, much like freedom of speech, derives both from logic and from the case law. *Wesberry v. Sanders*, 376 U.S. 1 (1964), *Reynolds v. Sims*, 377 U.S. 533 (1964), *Carrington v. Rash*, 380 U.S. 89 (1965), *Harman v. Forssenius*, 380 U.S. 528 (1965), *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), *Avery v. Midland County*, 390 U.S. 474 (1968), *Kramer v. Union Free School District*, 395 U.S. 621 (1969), *Cipriano v. City of Houma*, 395 U.S. 701 (1969), *Evans v. Cornman*, 398 U.S. 419 (1970), and *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970). If, as this Court said in *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), the crux of the first amendment is that "debate on public issues should be uninhibited, robust, and wide open" the purpose of this amendment is clear—the better to effectuate self-government and the democracy which has sustained us for nearly 200 years. Again and again, this Court has characterized the electoral franchise as being "close to the core of our constitutional system," *Carrington v. Rash*, 380 U.S. 89, 96 (1965), as "of the very essence of a democratic society," any restriction of which strikes "at the heart of representative government," *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), and statutes distributing the franchise as constituting "the foundation of our representative society," *Kramer v. Union Free School District*, 395 U.S. 621, 626 (1969).

The intertwining of the rights of free speech and free press with the right of the franchise has been evident,

too, from the actions of this Court, and the standards it has required in voting cases. As already noted, first amendment standards and standards affecting the franchise are of the same high degree of stringency. The four contemporary standards which must be met in cases involving fundamental rights are the same whether applied to the right to vote or to the first amendment freedoms:

(a) The "compelling" state interest test, as set out in *Cipriano v. City of Houma,* 395 U.S. 701 (1968); *Kramer v. Union Free School District,* 395 U.S. 621 (1966); *Castro v. State,* 2 Cal. 3d 223, 446 P. 2d 244, 85 Cal. Rptr. 20 (1970), is comparable to the first amendment requirement of an "overriding and compelling interest" in *DeGregory v. New Hampshire,* 383 U.S. 825, 835 (1966).

(b) The close scrutiny required by *Wesberry v. Sanders,* 376 U.S. 1, 18 (1964) and the "precision" required by *Kramer* and *Carrington v. Rash,* 380 U.S. 89, 95 (1965), find their equivalent in the first amendment doctrine of *Cantwell v. Connecticut,* 310 U.S. 296, 307 (1940) (a law must be "narrowly drawn to prevent the supposed evil").

(c) The state, not the challenging party, has the burden of demonstrating that the standards have been met. *See, e.g., Kramer,* 395 U.S. at 633; *Hadnott v. Amos,* 394 U.S. at 364; *Gaston County v. United States,* 395 U.S. 285 (1969). This is also true where the first amendment is involved. See, *e.g., NAACP v. Button,* 371 U.S. 415, 432 (1963).

(d) Prerequisites, procedures and conditions for the use of the franchise must not be more burdensome than necessary. See, *e.g., Hadnott; Gaston County; Williams v. Rhodes,* 393 U.S. 23 (1968); *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966); *Harman v. Forsennius,* 380 U.S. 528 (1965); *Wesberry; Lane v. Wilson,* 307 U.S.

268 (1969). The equivalent first amendment doctrine of not allowing unnecessarily burdensome requirements is particularly applied in cases involving permit requirements such as *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

The recognition that voting is close to the core of our system, and that whatever actions the states take must be scrupulously examined, points to the determination in voting cases, as in free speech cases, that abstention is simply not allowable. Thus this Court, in *Harman v. Forssenius*, 380 U.S. 528 (1965), where a Virginia poll tax law was struck down, went a long way toward adopting the view that abstention was improper in such cases:

> In addition to the clarity of the Virginia statutes, support for the district court's refusal to stay the proceedings is found in the nature of the constitutional deprivation alleged and the probable consequences of abstaining . . . . As this Court has stressed on numerous occasions, '[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.' *Id.*, at 537.

This Court then declared the cardinal rule of abstention in voting cases, a rule ignored by the court below: that abstention was improper because "the District Court was . . . faced with a claimed impairment of the fundamental civil rights of a broad class of citizens." *Id.*, at 537. *Harman* has become a guidepost in civil rights litigation and, most particularly, voting cases. The most recent example of this is *Edwards v. Sammons*, 437 F. 2nd 1240 (5th Cir. 1971), decided by another panel of the Fifth Circuit scarcely a month before the panel in the instant case reached a diametrically opposed result.

Sammons involved the disenfranchisement of nearly 200 voters because they had failed to pay a city ad

valorem tax. The district court had abstained, saying that state law was unclear, and that resort should therefore be had to the state courts for a clarification of the statute. The Fifth Circuit, per Judge Bell, was quick and forceful in reversal:

> It is not altogether clear that the federal constitutional question would be avoided by a construction of the charter and statutes in the state court . . . Indeed, the state trial court ruled for defendants on the state question. This means that it is arguably clear that piecemeal adjudication and delay may occur. *We take Harman v. Forssenius to mean that the delay which follows from abstention is not to be countenanced in cases involving such a strong national interest as the right to vote.* 437 F. 2d at 1244 (emphasis added).

The importance of the fact that the right to vote was at stake in Sammons is underscored by the observation that, in a normal case of abstention, involving only economic and not civil rights, the fact that state law may be somewhat unclear or that a decision of the state court may clarify or even moot the constitutional claims would be controlling. Cf. *Reetz v. Bozanich,* 397 U.S. 82 (1970); *Railroad Commission of Texas v. Pullman Co.,* 312 U. S. 496 (1941). The court in *Sammons* did not evade this point, but met it head-on:

> It may appear . . . that where the issue of state law could clearly moot the constitutional question by construction of the state statutes involved without resort to any federal constitutional construction, applying the doctrine of abstention would be the proper course. This, however, is an over simplication of the doctrine.
>
> These approaches must . . . take into consideration the nature of the controversy and the particular right sought to be enforced . . . Harman v. Forssenius points up the error in abstaining here . . . . 437 F. 2d at 1243.

Rights that are centered in the very core of our democracy are too precious to be ignored by federal courts. These critical federal rights should be protected by federal courts, not shunted off to state systems involving delay and lack of intimacy with federal issues and decisions. The Fifth Circuit decision below ignored both those policies and controlling case law, and should be reversed.

II. The District Court Properly Did Not Abstain and Leave the Voting Rights of the Petitioners to the Alabama State Courts. Its Decision Not to Abstain, But to Proceed to Trial With Petitioners' Claims of Mass Discriminatory Disfranchisement, Was Well Within Its Discretion, and Should Not Have Been Reversed By the Court Below, Without Briefs and Oral Arguments on That Point.

The first case of abstention, *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), made clear that the doctrine is grounded in the discretionary equity power of the court. In *NAACP v. Bennett*, 360 U.S. 471 (1959), this Court held that district courts should not automatically refer statutes to state courts for construction where the plaintiff claimed that the unconstitutionality of the statute was obvious. The granting of discretion to trial judges, except in cases "where a federal constitutional question is intermingled with unsettled questions of state law," has been applauded by Professor Wright. Wright, *The Abstention Doctrine Reconsidered*, 37 Tex. L. Rev. 815, 825-826 (1959).

It was only when the court below handed down its opinion, on March 16, 1971, nearly two and a half years after the filing of the complaint, that the word "abstention" was ever uttered in connection with this case.

In this case, abstention is especially improper because

of the inequities and irreparable injury which the invocation of the abstention doctrine will work upon the plaintiffs. "The abstention doctine, first outlined in any detail in *Railroad Comm'n of Texas v. Pullman Co.*, . . . is based on notions of comity rather than of jurisdiction," *Klim v. Jones*, 315 F. Supp. 109, 117 (N.D. Calif. 1970), *cf. Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), and "is equitable in its origins," *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 328 (1964).

This Court has said that

> . . . even though constitutional issues be involved, "reference to state courts for construction of a statute should not automatically be made." *Id.*, at 329, citing *N.A.A.C.P. v. Bennett*, 360 U.S. 471 (1959).

Particularly when the district court exercises its jurisdiction and reaches a decision on the merits of the case, it is improper and inequitable for an appellate court automatically to direct abstention, unless an abuse of discretion on the part of the district court is shown.

One of the factors which this Court has traditionally considered in determining whether to invoke the doctrine of abstention is whether a delay in the "ultimate adjudication on the merits for an undue length of time" will occur. *Baggett v. Bullitt*, 377 U.S. 360, 378-79 (1964). In *Baggett*, this Court said:

> Remitting these litigants to the state courts for a construction of the 1931 oath would further protract these proceedings, already pending for almost two years, with only the likelihood that the case, perhaps years later, will return to the three-judge District Court and perhaps this Court for a decision on the identical issue herein decided. *Id.* at 379.

In *Griffin v. County School Board of Prince Edward County*, supra, 377 U.S. at 228-29, the Court stated that,

independently of any other reasons for denying abstention,

> . . . we hold that the issues here imperatively call for decision now. The case has been delayed since 1951 by resistance at the state and county level, by legislation, and by lawsuits. The original plaintiffs have doubtless all passed high school age. There has been entirely too much deliberation and not enough speed in enforcing the constitutional rights . . . denied Prince Edward County Negro children.

Finally, in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 328-29 (1964), this Court accepted the

> District Court's decision that abstention was unwarranted . . . where neither party requested it and where the litigation had already been long delayed, despite the plaintiff's efforts to expedite the proceedings [and where there was no danger that a federal decision would work a disruption of an entire legislative scheme of regulation]. See *id.* at 327, n.4, for a chronology of court proceedings prior to the final decision.

It cannot be said that the district court abused the exercise of its discretion in deciding the issue on the merits. Where an abuse is not shown, the court of appeals should not be permitted to raise the non-jurisdictional issue of abstention on its own, especially in the face of the delay which will occur in final judicial determination of the scope of the fundamental right to vote. [1]

[1] Each day that a final adjudication is postponed visits irreparable injury on the plaintiffs by denying them that right. A showing of irreparable injury will justify even an interruption of actual state court criminal proceedings, a step which federal courts have traditionally been reluctant to take. Here, there is no possibility of offending notions of comity or the concepts of federalism pervading our judical system that make a court hesitate to interfere with state criminal proceedings. Younger v. Harris, 401 U.S. 37 (1971). But there is an irreparable injury to plaintiffs, which will be compounded if the court of appeals is allowed to direct abstention.

If abstention is indeed to be exercised, if at all, by the trial court in its discretion, an after-the-fact order of abstention here was clearly improper. To send this case now to the state courts, with the delay of two and a half years already involved, would be, petitioners submit, violative of the constitutionally guaranteed right to vote. Further, certiorari should be granted in order to delineate the boundaries of the abstention doctrine so that United States courts will not divest themselves of their constitutional duty in misreliance on *Younger v. Harris*, 401 U.S. 37 (1971).

CONCLUSION

For the above reasons, petitioners respectfully request that the writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

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IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION

JAMES A. HARRIS, JR.; *et al.*, suing individually and on behalf of others similarly situated,
Plaintiffs

vs.

W. O. SAMUELS, JR., individually and as Chairman of the Tuscaloosa County Board of Registrars; *et al.*,
Defendants

CIVIL ACTION No. 68-598

TEMPORARY INJUNCTION

Pursuant to the Findings of Fact and Conclusions of Law contemporaneously filed herewith;

It is ORDERED, ADJUDGED and DECREED as follows:

1. That the defendants, W. D. Samuels, Jr., individually and as Chairman of the Tuscaloosa County Board of Registrars; Jerri Richardson and Estelle Hansford, individually and as members of the Tuscaloosa County Board of Registrars; and the Tuscaloosa County Board of Registrars, and their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, who receive actual notice of this order by personal service or otherwise, be and each of them is hereby enjoined from denying registration to any

applicant, where the statutory period of residence and other requirements have been met, solely because the applicant is a student or the spouse of a student, when the applicant will sign a sworn statement that applicant presently intends to remain in Tuscaloosa County permanently or for an indefinite period after completing of applicant's studies at the University, or after his or her spouse completes his or her studies there, and does not intend and will not vote in another county within or without the state, in addition to Tuscaloosa County.

2. This injunctive order will become effective when the plaintiffs give security in the amount of $500.00 in accordance with and as conditioned by Rule 65(2)(c) of the Federal Rules of Civil Procedure.

Done and Ordered, this the 16th day of October, 1968.

H. H. GROOMS
United States District Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION

JAMES A. HARRIS, JR., *et. al.*
Plaintiffs

vs.

W. D. SAMUELS, JR., *et al*
Defendants

CIVIL ACTION No. 68-598

In conformity with the Findings of Fact and Conclusions of Law contemporaneously entered herewith, it is ORDERED, ADJUDGED and DECREED by the court that plaintiffs are not entitled to the relief for which they pray; that the temporary injunction heretofore granted by this court on October 16, 1968, be and the same is hereby vacated and dissolved; that this action, including the counterclaim of defendants, be and the same is hereby dismissed; and that the costs of court incurred herein be and the same are hereby taxed against plaintiffs.

DONE this 9th day of February, 1970.

SEYBOURN H. LYNNE
Chief Judge

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JAMES A. HARRIS, JR., *et al.*,
Plaintiffs-Appellants,

versus

W. D. SAMUELS, JR., *et al.*,
Defendants-Appellees.

No. 29683

Appeal from the United States District Court for the Northern District of Alabama.

(March 16, 1971)

Before RIVES, AINSWORTH and MORGAN, Circuit Judges.

RIVES, Circuit Judge: The plaintiffs Harris, Knowles, Robert Smith and Gomel are students at the University of Alabama in Tuscaloosa County, and the plaintiff Anne Smith is the wife of Robert Smith. They bring this action on behalf of themselves and as members of a class composed of students and spouses of students attending institutions of learning located in Tuscaloosa County, namely the University of Alabama and Stillman College. The de-

fendants are the Tuscaloosa County Board of Registrars and the three members of that Board.[1] The relief sought consists of preliminary and permanent injunctions requiring defendants to register plaintiffs and to refrain from denying residents the right to vote solely because they are students or the spouses of students. Federal jurisdiction is alleged under 28 U.S.C.A. §1331, §1343 and 42 U.S.C.A. §1983.

After a hearing Judge Grooms granted a temporary injunction which prevented the defendants

> ". . . from denying registration to any applicant, where the statutory period of residence and other requirements have been met, solely because the applicant is a student or the spouse of a student, when the applicant will sign a sworn statement that applicant presently intends to remain in Tuscaloosa County permanently or for an indefinite period after completing of applicant's studies at the University, or after his or her spouse completes his or her studies there, and does not intend and will not vote in another county within or without the state, in addition to Tuscaloosa County."

Upon submission for permanent injunctive relief, Chief Judge Lynne dissolved the temporary injunction, denied the plaintiffs relief, and dismissed the action. Pursuant to Rule 52, Fed.R.Civ.P., Judge Lynne found the facts specifically as follows:

> "*Findings of Fact*
>
> "1. Prior to the filing of this suit the policy of the Board of Registrars of Tuscaloosa County, Alabama (the Board) was to register students who were, in the opinion of the Board, bona fide residents or domiciliaries of such county.

[1] See Code of Alabama, Recompiled 1958, Title 17, §§ 21, *et seq.*

"2. The Board has not denied student voter applications for the single reason that the applicants were students but has consistently required some evidence to support a mere statement of intent from which it might be inferred that the student applicant intended to reside in Tuscaloosa County permanently or for an indefinite period of time.

"3. During the period from January, 1966, to October 14, 1968, more than 500 students were registered by the Board; other applications, as to which there is no record evidence, were rejected. During this period the Board indiscriminately and even handedly applied certain standards in determining whether students would be registered. After ascertaining that the student had or had not been a registered voter of another county or state, the Board uniformly proceeded as follows:

(a) The Board upon determining that an applicant was a student or a wife of a student attempted to determine by oral examination whether or not he or she had resided in the State, County and Precinct for a sufficient length of time to enable him or her to register.

"(b) Then attempted to determine whether or not they would reside in Tuscaloosa County after the completion of his or her studies or the studies of her spouse, and accepted among other things as supporting evidence as his or her statement or of his or her intention to so remain, the following:

"(1) Whether or not such applicant had attained a residence of Tuscaloosa County prior to his or her entry in school.

"(2) Whether or not the applicant's parents resided in Tuscaloosa County.

"(3) Whether or not after the student had come to Tuscaloosa as a student he or she had dropped from school for a sufficient period of time to acquire a residence.

"(4) Whether or not such student owned property a home or a business.

"(5) Whether or not if employed, his employment was primary and school secondary.

"(6) Whether or not such student had applied for and had been accepted for a position in Tuscaloosa upon graduation.

"(7) Any other factor which tended to convince the Board of his or her intent to reside in Tuscaloosa either permanently or for an indefinite period of time.

"(8) Further that in determining the eligibility of a male student, the Board did not consider the domicile of the wife, but rather gave to the wife the domicile of her husband, except in the case where the wife had been an established resident of Tuscaloosa County prior to her marriage.

"4. Following the issuance of a temporary injunction by Judge Grooms on October 16, 1968, and a rule to show cause on November 4, 1968, it was agreed that until a final hearing on the merits the Board would register all students who had been physically present in Tuscaloosa County for the requisite statutory period and who would sign an oath that they intended to reside in Tuscaloosa County permanently or for an indefinite time. More students were registered in equivalent periods preceding such agreement than subsequent thereto."

As the Court's conclusions of Law, Judge Lynne adopted "the exceptional memorandum prepared by Robert L. Potts, Law Clerk."

Upon appeal the plaintiffs vigorously attack both the findings of fact and the conclusion of law of the district court, and insist that the defendants are denying to them the equal protection of the laws in violation of the Fourteenth Amendment.

If the interlocutory or permanent injunction sought by the plaintiffs were upon the ground of the unconstitutionality of any State statute, a district judge of three judges would be required under 28 U.S.C. § 2281, *et seq.*, and jurisdiction of this appeal would lie in the Supreme Court under 28 U.S.C. § 1253. Instead, however, the plaintiffs' ground for seeking an injunction is that the defendants have erroneously construed the applicable Alabama statute in a manner which denies the equal protection of the laws to the plaintiffs and the class they represent. As stated in the brief of plaintiffs-appellants, pages 11 and 12:

> "The Board raised *Ala. Code* tit. 17, §17 in defense of their practice. Plaintiffs' position was and is that the Board's construction of the statute is unconstitutional, and that its proper and constitutional construction would not permit the Board's practice. The statute reads:
>
> > "No person shall lose or acquire a residence either by temporary absence from his or her place of residence without the intention of remaining, or by being a student of an institution of learning, or by navigating any of the waters of this state, the United States, or the high seas, without having acquired any other lawful residence, or

> by being absent from his or her place of residence in the civil or military service of the state, or the United States; neither shall any soldier, sailor or marine, in the military or naval service of the United States, acquire a residence by being stationed in this state.

> "In invalidating Texas' prohibition against servicemen's voting in *Carrington v. Rash*, 380 U.S. 89 (1965), the Supreme Court, referring specifically to this and similar provisions from other states, construed the clauses involving servicemen as not being absolutely determinative of residence. 380 U.S. at 92 n. 3.

> "The annotations indicate that the Alabama appellate courts have not chosen between the Board's construction (a bar to or at least a strong presumption against registration of county non-native students) and that of plaintiffs (a saving feature for those students whose interest remains with their parental home)."

According to the plaintiffs' argument, a proper construction of Alabama Code, Title 17, § 17 will result in removing the restrictions imposed by the defendants on their rights to vote in Tuscaloosa County which they claim to be a denial of the equal protection of the law.

Decision of whether Judge Lynne's findings of fact are clearly erroneous in any part would be difficult. A decision on what restrictions or qualifications can be constitutionally imposed upon students and their spouses as a prerequisite to voting in the county in which the college or university is located would be an extremely difficult and uncertain task in the present state of development of the jurisprudence. The plaintiffs argue that the

Supreme Court has developed a particularly stringent application of the equal protection clause in voting cases, and that the state interest relied on to justify the restrictive classification must be "compelling," not merely "rational" or "legitimate," citing: *Cipriano v. City of Houma*, 1969, 395 U.S. 701; *Kramer v. Union Free School District*, 1969, 395 U.S. 621, 627-28; *Harper v. Virginia Board of Elections*, 1966, 383 U.S. 663, 670.

The most recent case on the subject, *Oregon v. Mitchell*, 1970, [400] U.S. [112], decided December 21, 1970, discloses that the Justices of the Supreme Court disagree among themselves as to whether the equal protection clause of the Fourteenth Amendment restricts the power of the States to set voter qualifications, and if so, the extent of such restrictions. Justice Harlan strongly supported his view that the "Fourteenth Amendment was never intended to restrict the authority of the states to allocate their political power as they see fit * * *." Justices Brennan, White and Marshall supported some of the views now advocated by the plaintiffs:

> "The right to vote has long been recognized as a 'fundamental political right, because preservative of all rights.' *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1866); see *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). 'Any unjustified discrimination in determining who may participate in political affairs undermines the legitimacy of representative government.' *Kramer v. Union Free School District*, 395 U.S., at 626. Consequently, when exclusions from the franchise are challenged as violating the Equal Protection Clause, judicial scrutiny is not confined to the question whether the exclusion may reasonably be thought to further a permissible interest of the State. Cf. *Metropolitan Co. v. Brownell*, 294 U.S.

> 580, 583-584 (1935). 'A more exacting standard obtains.' *Kramer v. Union Free School District,* 395 U.S., at 363. In such cases, 'the Court must determine whether the exclusions are necessary to promote a compelling state interest.' *Id.*, at 627; *Cipriano v. City of Houma,* 395 U.S. 701, 704 (1969)."

Justice Black was of the view that every distinction on account of race was forbidden, but that as to discriminations other than those on account of race, the rule was different:

> "Above all else, the Framers of the Civil War Amendments intended to deny to the States the power to discriminate against persons on account of their race. *Loving v. Virginia,* 388 U.S. 1 (1967); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960); *Brown v. Board of Education,* 347 U.S. 483 (1954); *Slaughter House Cases,* 16 Wall. 36, 71-72 (1872). While this Court has recognized in some instances that the Equal Protection Clause of the Fourteenth Amendment protects against discriminations other than those on account of race, see *Reynolds v. Sims,* 377 U.S. 533 (1964); *Hadley v. Junior College District,* 397 U.S. 50 (1970); see also *Kotch v. Board of River Port Pilots,* 330 U.S. 552 (1947), the cases cited therein, it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves. The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people. On the other hand, the Civil War Amendments were unquestionably designed to condemn and

> forbid every distinction, however trifling, on account of race."

None of the Justices disagreed with the following views eloquently expressed by Justice Black:

> "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county and municipal offices and the nature of their own machinery for filling local public offices. *Pope v. Williams,* 193 U.S. 621 (1904); *Minor v. Happersett,* 21 Wall. 162 (1874)."

In a matter of such importance to the States and their governments, a federal court should be slow to intervene, but should instead avoid needless conflict with the administration by the State of its own affairs. Cf. *Alabama Public Service Commission v. Southern Railway Co.,* 1951, 341 U.S. 341, 349, 350.

Neither the federal district court nor this Court should construe the State statute, for that would be a mere tentative answer which may be displaced tomorrow by a controlling State adjudication. *Railroad Commission v. Pullman Co.,* 1941, 312 U.S. 496, 500. Nor should the federal courts proceed to a premature and perhaps unnecessary constitutional adjudication. *Id.*

In short the federal district court, upon final submission, properly dissolved the temporary injunction; it should not, however, have proceeded to a decision on the merits as to permanent injunctive relief but should have abstained from further proceeding and retained jurisdiction until the State courts have authoritatively construed the State statute or until efforts to obtain such an ad-

judication have been exhausted. *See Government Employees v. Windsor*, 1957, 353 U.S. 364, 367. If the plaintiffs then desire to proceed further in the federal district court, appropriate amendments to the pleadings should be permitted, and, if required, a three-judge district court may be convened. See 28 U.S.C. § 2281, *et seq.*

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1970

JAMES A. HARRIS, JR., *et al.*,
Plaintiffs-Appellants,

versus

W. D. SAMUELS, JR., *et al.*,
Defendants-Appellees.

No. 29683
D. C. Docket
No. CA
68-598

Appeal from the United States District Court for the Northern District of Alabama.

Before RIVES, AINSWORTH and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

Issued As Mandate: March 16, 1971

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JAMES A. HARRIS, JR., *et al.*,
Plaintiffs-Appellants,

versus

W. D. SAMUELS, JR., *et al.*,
Defendants-Appellees.

No. 29683

Appeal from the United States District Court for the Northern District of Alabama.

(April 7, 1971)

ON PETITION FOR REHEARING

Before RIVES, AINSWORTH and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JAMES A. HARRIS, JR., *et al*,
Plaintiffs-Appellants,

versus

W. D. SAMUELS, JR., *et al*,
Defendants-Appellees.

No. 29683

ON CONSIDERATION OF THE APPLICATION of the appellants in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of Sixty (60) days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within Sixty (60) days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition has been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of Sixty (60) days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

/s/ RICHARD T. RIVES
United States Circuit Judge

Dated: